Supreme Court, U. S.
FILED
NOV 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

NO. 78-705

P. D. Q., INC. OF MIAMI,

Petitioner,

v.

NISSAN MOTOR CORPORATION IN U.S.A. and NISSAN MOTOR COMPANY, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

HAMMOND E. CHAFFETZ
FRANK CICERO
JEFFREY S. DAVIDSON
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
312/861-2000

MORRIS F. KLEIN
BLACKWELL, WALKER, GRAY, POWERS, FLICK & HOEHL
2400 First Federal Building
S.E. Third Avenue
Miami, Florida 33131
305/358-8880

Attorneys for Respondents.

DATED: November 29, 1978

La Salle Street Press — Chicago Printed in U.S.A.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
I. Petitioner's "Question Presented" Is Not Posed On The Record In This Case	4
A. Petitioner's "Question Presented" Assumes Facts Which Were In Dispute In The Trial Court And Decided Against Petitioner By The Jury	4
B. The Jury Evaluated The Co-op Program According To The *Per Se* Standard Which Petitioner Claims Is Applicable	8
II. The Court of Appeals Decision Correctly Applies All Relevant Supreme Court Decisions And Is Not In Conflict With Any Decision Of Another Circuit Court	10
CONCLUSION	15

TABLE OF AUTHORITIES

	PAGE
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) ...	13
Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977)	13
Kugler v. *Aamco Automatic Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972)	14
Miller Motors v. *Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958)	14
Mount Vernon Sundat, Inc. v. *Nissan Motor Corp.*, 1976-1 Trade Cases (CCH) ¶ 60,842 (E.D.Va. 1975), *opinion vacated and action dismissed with prejudice*, 1977-1 Trade Cases (CCH) ¶ 61,507 (E.D.Va. 1977).	15
Nelligan v. *Ford Motor Co.*, 262 F.2d 556 (4th Cir. 1959)	14
Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1 (1958)	13
Parker v. *Brown*, 317 U.S. 341 (1943)	13
PDQ, Inc. v. *Nissan Motor Corp.*, 577 F.2d 910 (5th Cir. 1978)	3
Sulmeyer v. *Coca Cola Co.*, 515 F.2d 835 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976)	14
Sunrise Toyota, Ltd. v. *Toyota Motor Co.*, 55 F.R.D. 519 (S.D.N.Y. 1972)	14
United Shoppers Exclusive v. *Broadway-Hale Stores, Inc.*, 1966 Trade Cases (CCH) ¶ 71,727 (N.D.Cal. 1965)	14
United States v. *Sealy, Inc.*, 1964 Trade Cases (CCH) ¶ 71,258 (N.D.Ill. 1964), *aff'd*, 388 U.S. 350 (1967) ..	12
United States v. *Serta Associates, Inc.*, 296 F.Supp. 1121 (N.D.Ill. 1968), *aff'd per curiam without opinion*, 393 U.S. 534 (1969)	11
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 9, 13	
United States v. *Trenton Potteries Co.*, 273 U.S. 392 (1927)	13
Virginia Pharmacy Board v. *Virginia Consumer Council*, 425 U.S. 748 (1976)	13
White Motor Co. v. *United States*, 372 U.S. 253 (1963)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

NO. 78-705

P. D. Q., INC. OF MIAMI,

Petitioner,

v.

NISSAN MOTOR CORPORATION IN U.S.A. and NISSAN MOTOR COMPANY, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

The question purportedly presented by petitioner is not presented on this record. Under proper instructions which present no novel or conflicting questions of law, the jury found that none of the alleged contracts, combinations or conspiracies existed. The jury so found upon ample evidence that respondents did not seek to eliminate discount advertising and did not in fact do so, that dealers were not prohibited from discount advertising but freely used discount ads, and that reimbursement of dealers for their advertising was not in fact conditioned on compliance with

any discounting prohibition. In the Court below, petitioner expressly declined to contest the sufficiency of the evidence supporting the jury verdict.

No substantial question is presented for review by this Court.

STATUTES INVOLVED

15 U.S.C. § 1 (The Sherman Act) and 15 U.S.C. § 1231 *et. seq.* (The Monroney Act).

STATEMENT OF THE CASE

This is an appeal from the affirmance by the Court of Appeals for the Fifth Circuit of a judgment entered on a jury verdict in favor of the respondents following a five week trial before Judge C. Clyde Atkins of the Southern District of Florida. *See* 577 F.2d 910 (5th Cir. 1978).

Petitioner's complaint charged a nationwide conspiracy between respondents and Datsun dealers to sell and advertise Datsun motor vehicles at prices fixed by respondents, to restrict territories and to prohibit sales through discount houses. (Petition Appendix 3a-4a, hereinafter "Pet. App.") At trial, petitioner maintained that respondents had engaged in an agglomeration of illegal restraints and methods of achieving illegal resale price maintenance. The evidence introduced at trial included thousands of pages of documentary exhibits submitted by both sides and the testimony of more than 85 Datsun dealers and other witnesses. The trial record comprised more than 5,600 pages of transcript.

Under the instructions, had the jury found the facts concerning the cooperative advertising program to be as asserted in the petition, they could readily have found the conspiracy charged. The jury found there was no such conspiracy. On appeal in the Court below, the petitioner expressly declined to argue that the verdict was "against the weight of the evidence" (Pet. App. 3a), thus conceding for these appeals that the evidence supports the verdict. Instead, petitioner chose to assert more than a dozen claimed errors of law, only one of which it still maintains here.

ARGUMENT

The Court of Appeals held that a "cooperative advertising program" formerly used by Nissan-USA and franchised Datsun dealers should be evaluated by the "rule of reason" and that, so evaluated, the program was lawful. In point II of this Argument respondents will demonstrate that the Court of Appeals' decision was both correct and consistent with prior authorities.

In passing on the Petition for Certiorari, however, a crucial threshold point is that the petition raises an abstract legal question which does not present a controversy appropriate for decision by this Court. The jury in this case did in fact evaluate the "co-op program" according to the *per se* standard which petitioner claims is applicable. Consequently, the issue of law petitioner purports to raise is not truly presented. Instead, petitioners are in effect asking this Court to reach an abstract legal question based on an inaccurate description of the co-op program in the petition. The facts which petitioner asserts constitute the co-op program were in dispute at trial. In reaching its verdict, the jury necessarily rejected petitioner's version of the facts. The jury did so upon substantial evidence and petitioner expressly elected not to challenge on appeal the sufficiency of the evidence to support the jury's verdict. (Pet. App. 3a) Consequently, as is demonstrated in point I, even if petitioner had raised an issue of law worthy of consideration by this Court, that legal issue is not posed and ripe for adjudication on the facts of this case and cannot be reached by the Court.

I. Petitioner's "Question Presented" Is Not Posed On The Record In This Case.

A. Petitioner's "Question Presented" Assumes Facts Which Were In Dispute In The Trial Court And Decided Against Petitioner By The Jury.

Petitioner's effort to secure Supreme Court review of the Court of Appeals' decision is premised upon an inaccurate description of a cooperative advertising program formerly used by Nissan-USA and franchised Datsun dealers. (Pet. at 3) The legality of the program cannot be considered without first determining what the program was. Such a determination was a factual issue at trial which the jury was required to consider before reaching its verdict.

The evidence before the jury established that the co-op program was a vehicle for providing financial assistance for advertising efforts of local Datsun dealers, especially in the area of television advertising normally beyond the means of individual dealers. (PX-3025; Tr. 2616, 3409) Under the program, each Datsun dealer had a co-op "account". A dealer's contribution to that account was collected as a per-vehicle charge which appeared on the Nissan-USA invoice to the dealer when he purchased a Datsun for resale. Nissan-USA then made a matching contribution to the account. Thereafter, the funds in a dealer's co-op account were used to reimburse him for advertising. (Tr. 3205, 3572)

The Petition's description of the co-op program (Pet. at 3) is based upon a few Nissan-USA bulletins which stated that dealer advertising using prices other than the suggested list price required by the federal Monroney Act, 15 U.S.C. § 1231 *et. seq.*, was not eligible for reimbursement out of

co-op funds. However, even these particular bulletins did not prohibit discount advertising. In the contemporaneous words of Nissan-USA's National Advertising Manager, "none of our advertising rules and regulations says that we insist that a dealer advertises for such and such a price." (DX-3472) Moreover, dealers were completely free to do any kind of advertising they desired with their own funds. Virtually all dealers did advertising over and above their co-op accounts, and for many dealers the co-op fund represented only a fraction of their advertising budgets.[1]

Moreover, the evidence before the jury showed that the co-op program was explicitly not intended to control or relate to a dealer's actual selling price. For example, a Nissan-USA bulletin to dealers explaining the program stated flatly that "[w]e cannot nor are we attempting to establish your retail selling price. . . ." (DX-5474, p. 3)

The distribution of the particular Nissan-USA bulletins relied upon by petitioner, and the actual terms of the entire co-op reimbursement program, were disputed factual issues at trial. Fifty-four Datsun dealers from all across the country testified at trial in person or by deposition, and petitioner *stipulated* that thirty-one other specifically identified Datsun dealers would have given the same testimony had they been called as witnesses. (Tr. 4781-86) Many of these dealers did not receive or could not recall receiving the bulletins relied upon by petitioner, and were never aware of any pricing restrictions on co-op reimbursement.[2]

Moreover, the evidence the jury considered showed that the co-op program as actually implemented did not in fact

[1] Tr. 1019; 2452; 2552-53; 2739; 2834; 2839-40; 2952-53; 3194; 3458; 3489; 3531-32; 3869; 3938. *See also* Tr. 2789; 3058; 3128-29; 3348; 3412-13; 3725; 3765-66; 3793; 3844; 4353-54; 4406; 4432.

[2] Tr. 2684-87; 3499-3500; 3592-93; 3598-99; 3776; 3841-42.

condition recovery of a dealer's co-op contribution on compliance with any discount advertising prohibitions, as petitioner suggests. (Pet. at 2) Datsun dealers frequently received co-op reimbursement for discount, sale, and giveaway ads.[3] From 1967 to 1972, the dollar amount of reimbursement refused dealers for reasons challenged by petitioner represented only 0.1% of dealers' contributions to co-op funds.[4]

Although petitioner now claims that the cooperative advertising program was a key element of an alleged "scheme . . . to control price advertising" (Pet. at 3), the trial record considered by the jury disproves this claim. During the trial, the Datsun dealer witnesses, as well as respondents' witnesses, unanimously denied that Nissan-USA entered into agreements with dealers concerning or restricting the content of their advertising or, in particular, concerning whether or not they would advertise price discounts. Nor did Nissan-USA pressure or threaten dealers to influence their advertising's content, or to prevent or inhibit discount ads.[5] Quite the contrary, the dealers testified that they themselves determined the content of their advertising, and whether or not they advertised price discounts, on the basis of their own independent business judgment.[6] Many

[3] Tr. 2734 and 2739-40; 3413; 3589; and 858-59; 869-70; 2739-40; 2836; 3632-33; 3765-66; 3832; 4024-27; 4106-07.

[4] Calculated from Tr. 2237-38, DX-5474, PX-1000b.

[5] Tr. 4834; 4606; 2452; 2551, 2601; 2738; 2949; 3953; 3193; 3348-49; 3412; 3572; 3722, 3724, 3728; 3935-36; 4023; 4170-71; 4404. *See also* 1107-08; 2786-87, 2794-95; 2832; 3037, 3039; 3059, 3061; 3121, 3126-27; 3258-59; 3307, 3309; 3445; 3466; 3484; 3501; 2628, 3627; 3648; 3681; 3795; 3835-36; 3902-03; 3987-88; 4101, 4103-04; 4127-28; 4239, 4254; 4356; 4703-04; 4732-33; 4749-50.

[6] Tr. 2448; 2551; 2738; 3412; 3725; 3935; 4023; 4169; 4401, 4405. *See also* 916; 2676; 3445; 3486.

dealers did in fact advertise price discounts, and others did not, for their own independent reasons.[7]

In short, the purpose, terms, and effect of the cooperative advertising program, which petitioner has asserted as the foundation for its argument here, were all disputed factual issues at trial. Respondents introduced substantial evidence proving that the co-op program's purpose, terms, and effect were not anticompetitive and were quite different from what petitioner has claimed to this Court. The District Court therefore properly submitted to the jury the factual question of whether the co-op program constituted a contract, combination, or conspiracy of the type which the Court instructed would violate the Sherman Act, 15 U.S.C. § 1.

B. The Jury Evaluated The Co-op Program According To The *Per Se* Standard Which Petitioner Claims Is Applicable.

In view of what the petitioner has portrayed as the legal issue presented by this case, it is critical to note that the jury was instructed to evaluate the lawfulness of the co-op program under the *per se* rule which petitioner claims is applicable. Thus, the jury was asked by a special verdict to determine whether or not there existed a "contract, combination or conspiracy between Nissan-USA and its franchised Datsun dealers. . . ." (Special Verdict No. 1) In answering this special verdict, the jury was instructed to concern itself with "the agreements alleged by plaintiffs to be unlawful under the antitrust laws—that is, anticompetitive agreements between defendants and all Datsun dealers to sell and advertise only at fixed prices, to establish exclusive territories, and to refrain from selling Datsuns to particular classes of customers." (Tr. 5579)

[7] Tr. 992; 2441-48; 2537-43; 2667, 2672; 2734-38; 2830-31; 2943-52; 3097; 3191-94; 3411-12; 3446-47, 3457; 3565, 3571; 3632; 3722-23; 3765-66; 3791-93; 3870; 4022-24; 4095; 4169-71, 4186; 4354, 4359; 4403-05.

Even more particularly, the District Court instructed the jury that petitioner alleged an "unlawful combination and/or conspiracy", the terms of which included that "Nissan USA extracted adherence from the Datsun dealers to a business practice or policy of not advertising below manufacturer's suggested retail prices or advertising which inferred price discounting." (Tr. 5566-67)

In explaining to the jury what constituted an unlawful contract, combination or conspiracy requiring an affirmative answer to Special Verdict No. 1, the District Court unequivocally charged that *any* contract, combination or conspiracy either for the purpose or with the effect of raising, lowering, or stabilizing prices was unlawful. In particular, the jury was instructed that the antitrust laws were violated by:

> (1) "*any* mutual agreement or arrangement or understanding between two or more persons to sell at a uniform price or to raise or lower or to stabilize prices," or
>
> (2) any "*contract,* combination or conspiracy *which has the effect* of fixing, maintaining or stabilizing resale prices. . . ." (Tr. 5576-77) (emphasis added)

Therefore, the final charge was a classic statement of the *per se* rule. The charge did not set forth the "rule of reason" or explain any of its elements.[8] Indeed, the final jury instructions fully embraced the petitioner's argument (Pet. at 6-7), drawn from *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), that to the extent any activities "raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces" and thus unlawful. *Id.* at 221.

[8] Indeed, the jury was told that reasonableness or unreasonableness was immaterial. (Tr. 5577)

As petitioner's counsel strenuously argued to the jury in closing arguments (*see, e.g.*, Tr. 5266-67, 5270, 5276-77), under the final instructions the jury could not answer "No" to Special Verdict No. 1, as it did, without first concluding that the co-op program never had any purpose or effect of raising, lowering, maintaining, or stabilizing prices. As shown above, the jury verdict was supported by substantial evidence—in fact, so very substantial that petitioner expressly disavowed any effort to challenge the sufficiency of the evidence before the Court of Appeals. (Pet. App. 3a)

In sum, petitioner does not have any meritorious complaint about the legal standards which were applied at the trial. Under final instructions which fully expressed the legal position advocated in the petition, the jury concluded that the co-op program did not constitute a contract, combination or conspiracy of the type which, it was clearly instructed, violated the antitrust laws.

II. The Court of Appeals Decision Correctly Applies All Relevant Supreme Court Decisions and Is Not In Conflict With Any Decision Of Another Circuit Court.

Before the Court of Appeals, petitioner argued that the District Court should have in essence directed a verdict against respondents on the cooperative advertising issue by instructing "that as a matter of law Nissan's cooperative advertising program was a *per se* violation of § 1 of the Sherman Act." (Pet. App. at 4a) In rejecting this argument, the Court of Appeals did not simply rely on the many factual issues concerning the purpose, terms, and effect of the program which precluded such a preemptory instruction. Instead, the Court of Appeals decided the case on broader grounds by first assuming for the purpose of its decision the particular view of the co-op evidence advocated by petitioner and rejected by the jury. (Pet. App. 5a-6a) The Court, after assuming the petitioner's characterization of the evidence, concluded that the Nissan cooperative advertising program was not as a matter of law a violation of § 1 of the Sherman Act. (Pet. App. 8a) In so holding, the Court of Appeals was correct and entirely consistent with prior authorities.

None of the Supreme Court cases cited by petitioner is in any way inconsistent with the Court of Appeals decision. *United States* v. *Serta Associates, Inc.*, 296 F.Supp. 1121 (N.D. Ill. 1968), *affirmed per curiam without opinion*, 393 U.S. 534 (1969), the case upon which petitioner places its greatest reliance (Pet. at 6), involved factual findings of a horizontal conspiracy to fix actual prices as well as all advertised prices. 296 F.Supp. at 1122-23, 1125-26. In contrast, the present case involves an alleged vertical conspiracy and a factual finding by a jury that no conspiracy ever existed. (Pet. App. 3a, 7a-8a)

Although the District Court in *Serta* did review a particular cooperative advertising arrangement, the *Serta* arrangement was significantly different from the Nissan program in two crucial respects. First, a dealer in *Serta* was "not allowed to participate in the program unless *all* of his advertisements contained Serta's suggested retail prices." 296 F.Supp. at 1125 (emphasis supplied). In the present case, however, there was not even arguably any restraint on dealer discount advertising not within the scope of the pro-

gram. Second, the *Serta* prohibition on discount advertising was enforced by the outright termination of offending dealers and threats of such termination. 296 F.Supp. at 1123-24 & n. 3. Again, however, petitioner does not claim to this Court, and did not claim to the Court of Appeals, that there were any terminations, or threats of termination, of Datsun dealers for advertising below the federally-mandated Monroney sticker price.

It could not possibly be said of the Nissan program, as was determinative of the advertising issue in *Serta,* that "[w]hen combined with the surveillance of all advertising, this practice hampered dealers who wanted to sell below the advertised price because they had only three options; they could advertise Serta standard items at the prices contained in the specifications, advertise without using a price, or refrain from any advertising." 296 F.Supp. at 1125.

In the other case principally relied upon by petitioner, *United States* v. *Sealy, Inc.,* 388 U.S. 350 (1967), although the District Court made findings of fact pertaining to advertising, this Court did not decide any issue pertaining to advertising. Rather this Court in *Sealy* held unlawful a horizontal "aggregation of trade restraints" encompassing "flagrant and pervasive price-fixing", territorial allocation, and a horizontal agreement among Sealy licensee-stockholders to fix the retail prices at which all Sealy products could be advertised. 388 U.S. at 354-356.[9]

[9] That the *Sealy* agreement prohibited all discount advertising regardless of who paid for it is apparent from the trial court opinion. *See United States* v. *Sealy, Inc.,* 1964 Trade Cases (CCH) ¶ 71,258, at pp. 80,091-2 (N.D. Ill. 1964). Moreover, the final decree, entered "in compliance with the mandate of the Supreme Court," made no mention of cooperative advertising. *See United States* v. *Sealy, Inc.,* 1967 Trade Cases (CCH) ¶ 72,327, at p. 84,855 (N.D. Ill. 1967).

Bates v. *State Bar of Arizona,* 433 U.S. 350 (1977), and *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748 (1976), also cited by petitioners, were not antitrust cases at all but rather dealt with the application of the First Amendment to state limitations on advertising.[10] In any event, those cases involved complete bans on advertising of any kind (whether or not involving prices), and hence are hardly precedents relevant to cooperative programs designed to subsidize and thus encourage dealer advertising.

Petitioner's suggestion that the decision below is somehow in conflict with *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), is without justification. The Court of Appeals simply quoted the *Sylvania* decision for the proposition that horizontal cases like *Serta* and *Sealy,* even if relevant, should not be extended to create new *per se* rules in vertical cases unless the decision to do so is "based upon demonstrable economic effect." 433 U.S. at 59. Here, the jury verdict demonstrates the absence of any economic effect (*see* pp. 8-9, *supra*).[11]

Finally, as previously shown (*see* p. 9, *supra*), the legal standards set forth in *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940) and *United States* v. *Trenton Potteries Co.,* 273 U.S. 392 (1927), cited by petitioner, were

[10] The complaint in *Bates* alleged a Sherman Act violation but that issue was never litigated because such a claim was barred by the state action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943). *See* 433 U.S. at 359-363.

[11] *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958) and *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), which petitioner tacks on to its *Sylvania* argument, do not support petitioner's position. *Northern Pacific* held that a practice is classified *per se* unlawful only after it has been demonstrated to have a "pernicious effect on competition," 356 U.S. at 5, which the jury here found absent. *White Motor* held territorial restrictions *not* illegal *per se.* Neither case had anything to do with advertising.

fully applied by the trial court. The Court of Appeals also correctly applied those authorities in observing that they rendered illegal *per se* "agreements specifically designed to raise, lower, or stabilize prices in a manner which interfered with the free play of market forces" (Pet App. 8a), and in refusing to overturn the jury verdict that such an agreement was not established by the evidence in this case.

The Court of Appeals decision not only correctly applies all relevant Supreme Court precedents, but also is supported by other Court of Appeals decisions. Cooperative advertising programs have been upheld in the Fourth Circuit, *see Nelligan* v. *Ford Motor Co.*, 262 F.2d 556 (4th Cir. 1959), and *Miller Motors* v. *Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); in the Eighth Circuit, *see Kugler* v. *Aamco Automatic Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972); as well as in an earlier decision of the Fifth Circuit, *see Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). Significantly, petitioner cannot cite a single conflicting Court of Appeals decision.

Similarly, District Court decisions are also consistent with the decision below. *See Sunrise Toyota, Ltd.* v. *Toyota Motor Co.*, 55 F.R.D. 519, 532 (S.D.N.Y. 1972). Indeed, *United Shoppers Exclusive* v. *Broadway-Hale Stores, Inc.*, 1966 Trade Cases (CCH) ¶ 71,727 (N.D. Cal. 1965), holds that even where, unlike the present case, a cooperative advertising program rigorously conditions reimbursement upon advertising suggested list prices, no violation of the Sherman Act has occurred:

> "A distributor might well decide in its own independent judgment that if he is going to pay for advertising, it will state the prices (if any) to be used in the advertising copy. After all, if the dealer wants to advertise at some other price, the dealer can pay for the ad." *Id.* at 82,282.

The *Broadway-Hale* rationale takes on additional force in the automobile industry where, as noted by the Court of Appeals below (Pet. App. 8a), suggested retail prices are not merely lawful, but are actually required by federal law. 15 U.S.C. § 1231 *et seq.* (The "Monroney Act").

In summary, petitioner has cited no authority at any level with which the Court of Appeals decision conflicts.[12] Moreover, petitioner has certainly cited no authority which even arguably suggests that petitioner is entitled to a judgment holding the co-op program *per se* unlawful in the face of a jury verdict necessarily based on a factual finding that the program had neither the purpose nor the effect of raising, lowering, or stabilizing prices. The Court of Appeals decision is correct and fully consistent with prior authorities, and thus presents no issue requiring Supreme Court review.

---

[12] Petitioner's inability to cite any authority for its unprecedented legal position is underscored by its reliance on a *vacated* decision *See Mount Vernon Sundat, Inc.* v. *Nissan Motor Corp.*, 1976-1 Trade Cases (CCH) ¶ 60,842 (E.D. Va. 1975), *opinion vacated and action dismissed with prejudice*, 1977-1 Trade Cases ¶ 61,507 (E.D. Va. 1977). Petitioner brushes the court's vacating of its earlier opinion aside with the unsupported claim that this action was motivated solely by a settlement. However, it is more plausible that the highly unusual step of vacating the opinion was motivated by the fact that the trial judge initially mistakenly thought his decision was controlled by a prior consent decree, contrary to the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a). Likewise irrelevant is petitioner's citation of Federal Trade Commission consent orders and complaints. (Pet. at 10)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: November 29, 1978

Respectfully submitted,

HAMMOND E. CHAFFETZ
FRANK CICERO
JEFFREY S. DAVIDSON
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
312/861-2000

MORRIS F. KLEIN
BLACKWELL, WALKER, GRAY, POWERS, FLICK & HOEHL
2400 First Federal Building
S.E. Third Avenue
Miami, Florida 33131
305/358-8880

Attorneys for Respondents.